

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Fred Noble and Faith Noble,)	
husband and wife,)	
Respondents,)	
v.)	
)	No. 80873-2
Safe Harbor Family)	
Preservation Trust,)	
a Washington Trust,)	En Banc
Petitioner,)	
)	Filed September 24, 2009
and)	
Tillicum Beach, Inc., et al.,)	
Additional Respondents.)	
_____)	

C. JOHNSON, J.—This case arises out of a condemnation action for a way of private necessity. It asks us to determine whether, under RCW 8.24.030, the trial court had the discretion to require the original condemnee to pay an alternative condemnee’s attorney fees and to reduce the original condemnee’s award of attorney fees due to the alternative condemnee’s involvement in the action. Fred

and Faith Noble (Nobles) filed a petition to condemn a way of private necessity across Safe Harbor Family Preservation Trust's (Safe Harbor) property to gain access to the Nobles' property. Safe Harbor (condemnee) defended by alleging that the Nobles had a feasible alternative route. The Nobles then added Tillicum Beach, Inc. (Tillicum), another adjoining lot owner, as an alternative condemnee. The trial court granted the easement over Safe Harbor's property, found Safe Harbor responsible for Tillicum's involvement, ordered it to pay Tillicum's attorney fees, and awarded Safe Harbor reduced attorney fees against the Nobles. Safe Harbor appealed on both attorney fee issues. In a split decision, the Court of Appeals, Division Two, affirmed the trial court's ruling. *Noble v. Safe Harbor Family Preserv. Trust*, 141 Wn. App. 168, 169 P.3d 45 (2007). We reverse in part and affirm in part.

Facts and Procedural History

In 1972, Paul and Agnes Stokes (Stokeses), the trustees of Safe Harbor, purchased the Safe Harbor property. The Stokeses created Safe Harbor and deeded the property to the trust for the benefit of their children. The Nobles own adjoining

property and have a recorded easement across Safe Harbor's property, but the easement cannot be used. In an earlier case, Safe Harbor and the Nobles litigated various issues involving the easement. In that case, the Court of Appeals ruled in an unpublished decision that since the Nobles' recorded easement could not be developed, they would have to condemn an easement to their property under chapter 8.24 RCW.¹

In March 2005, the Nobles filed their petition to condemn a private way of necessity over Safe Harbor's property. In its answer, Safe Harbor raised the following defense: "[t]here is a feasible alternative route available to the Petitioners." Clerk's Papers (CP) at 178. Safe Harbor did not name an alternative condemnee in its answer. Nor did it assert any claim against a third party.

In July 2005, the Nobles filed a motion for leave to amend their petition and add a claim against another adjoining property owner, Tillicum, as an alternate condemnee. To support their motion, the Nobles filed the declaration of their counsel, who stated in relevant part that

[r]espondents are taking the position that a way of necessity should be granted across property owned by Tillicum Beach, Inc. rather than property owned by original Respondents. In order to prevent two trials and to assure

¹ *Safe Harbor Family Preserv. Trust v. Noble*, noted at 120 Wn. App. 1060, 2004 WL 569290.

that there is not an inconsistent result, it is imperative that Tillicum Beach, Inc. and all owners of lots within the plat of Tillicum Beach be joined as additional parties' defendant.

CP at 163.

Tillicum is located directly to the south and adjacent to the Nobles' property. Fred Noble's parents own a house within Tillicum that abuts the Nobles' property. After Safe Harbor prevented the Nobles from using their property, the Nobles used Tillicum's property to access Mr. Noble's parents' lot, from which they would access their property.² Report of Proceedings (RP) (June 1, 2006) at 11-12, 20-21.

At trial, Tillicum and Safe Harbor litigated between themselves as to who should bear the burden of providing access to the Nobles' property. The trial court concluded that it would be less burdensome to grant a way of necessity over Safe Harbor's property. Tillicum then brought a motion for an award of its attorney fees and costs against Safe Harbor, asserting that Safe Harbor was "responsible" for it being a party to the litigation. The trial court awarded Tillicum fees against Safe Harbor and reduced the attorney fees and costs it awarded Safe Harbor against the

² The trial court found in relevant part that the Nobles "have not been able to use their home on Hood Canal, except occasionally by foot over an area that the owners of Tillicum Beach are polite about, but clear, that the Nobles are not welcome to use this means of access over the long term. As a matter of neighborly accommodation, Tillicum Beach has agreed to suffer the occasional trespass until this matter can be decided by the Court." Finding of Fact 11.

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Nobles by 70 percent, finding that most of the attorney fees Safe Harbor

incurred resulted from Safe Harbor's actions and Tillicum's involvement in the case.

In a split, published decision, the Court of Appeals affirmed the trial court's ruling finding it has broad discretion in awarding attorney fees under RCW 8.24.030,³ and it granted Tillicum attorney fees against Safe Harbor on appeal. The Court of Appeals majority reasoned that Safe Harbor was responsible for Tillicum's presence in the lawsuit, and the trial court did not err in "looking beyond the mechanical process of joinder" to decide who is responsible for the cost of litigating the claimed alternative route. *Noble*, 141 Wn. App. at 175.

Safe Harbor petitioned this court for review. It argues that the trial court erred in holding it responsible for Tillicum's attorney fees and that the Nobles, as condemnors, should be responsible for those fees. Safe Harbor also contends that the trial court abused its discretion in reducing its award of attorney fees against the Nobles. Accordingly, Safe Harbor asks us to award it reasonable attorney fees incurred in this matter, including those it incurred as a result of the Nobles' decision to sue Tillicum and the attorney fees and costs Safe Harbor incurred as a

³ *Noble v. Safe Harbor Family Preserv. Trust*, 141 Wn. App. 168, 169 P.3d 45 (2007).

result of its appeals. Tillicum, on the other hand, asks this court to affirm the award of attorney fees to them against Safe Harbor, including those Tillicum has incurred as a result of this appeal.⁴ The Nobles did not submit a brief to this court, but they appeared before us at oral argument.

Issues

- (1) Under RCW 8.24.030, does the trial court have the discretion to order Safe Harbor to pay Tillicum's attorney fees?
- (2) Under RCW 8.24.030, did the trial court abuse its discretion by reducing Safe Harbor's attorney fees against the Nobles?

Analysis

Chapter 8.24 RCW governs condemnation proceedings for a private way of necessity. In such proceedings, the condemnor has the burden of proving the reasonable necessity for a private way of necessity, including the absence of alternatives. *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 234, 181 P. 689 (1919). Under RCW 8.24.025, the trial court must consider alternative routes,

⁴ Before the trial court and the Court of Appeals, Tillicum argued, in the alternative, that the court should award it attorney fees against the Nobles. Tillicum did not make the same argument in its briefing to this court. See RAP 18.1(b).

according to the list of criteria provided in that statute.⁵

In a condemnation action for a private way of necessity, RCW 8.24.030 permits, but does not require, a trial court to grant a condemnee attorney fees. It provides:

In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee.

RCW 8.24.030.

In order to reverse an attorney fee award made pursuant to a statute or contract, an appellate court must find the trial court manifestly abused its discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.

⁵ "If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

"(1) Nonagricultural and nonsilvicultural land shall be used if possible.

"(2) The least-productive land shall be used if it is necessary to cross agricultural land.

"(3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run." RCW 8.24.025.

Here, the Court of Appeals majority, reasoning that RCW 8.24.030 grants a trial court “broad discretion” in awarding attorney fees, found the trial court properly held Safe Harbor “responsible” for Tillicum’s involvement in the lawsuit and liable for Tillicum’s attorney fees. *Noble*, 141 Wn. App. at 175. The majority rested its decision in part on its interpretation of *Kennedy v. Martin*, 115 Wn. App. 866, 870-73, 65 P.3d 866 (2003). The majority cited *Kennedy* for the proposition that “nothing in the language of RCW 8.24.030 or in the case law . . . prevents a court from requiring the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.” *Noble*, 141 Wn. App. at 175. The majority’s conclusion that Safe Harbor is “responsible” for Tillicum’s involvement is based on the facts that Safe Harbor raised the defense of “a feasible alternative route,” and then, after the Nobles joined Tillicum, Safe Harbor defended itself using the testimony of Paul Stokes, who the trial court determined was not a credible witness. *Noble*, 141 Wn. App. at 177.

In its briefing to this court, Tillicum echoes the Court of Appeals majority. Tillicum argues that Safe Harbor’s strategic decision not to join Tillicum after Safe Harbor raised the defense of a feasible alternative route “does not immunize it from

responsibility for [its] attorney fees under RCW 8.24.030.” Answer to Pet. at 9.

Tillicum contends that *Kennedy* supports its position because the Court of Appeals in that case required the original condemnee to pay the attorney fees of the alternative condemnee, who it had named and joined in the suit. Tillicum reasons that the case before us would have been the same as *Kennedy*, if Safe Harbor had actually named and joined Tillicum, instead of simply raising the defense of an alternative route. Answer to Pet. at 8-10. Here, Tillicum essentially argues that for the purposes of attorney fees, there should be no difference between an original condemnee who asserts the defense of a feasible alternative route and one who actually joins an alternative condemnee whose land allegedly bears the alternative route.

Although this court has not addressed the attorney fee provision under RCW 8.24.030, our Court of Appeals has analyzed attorney fee issues under this statute in several cases, namely *Sorenson v. Czingier*, 70 Wn. App. 270, 852 P.2d 1124 (1993) and *Kennedy*.⁶

In *Sorenson*, the condemnor, sued to condemn an easement over a lot owned

⁶ See also *Beckman v. Wilcox*, 96 Wn. App. 355, 979 P.2d 890 (1999).

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by John Czinger, so that Leif Sorenson could reach the western part of his

property. The condemnee defended by proposing an alternative route that crossed other landowners' property and accessed the eastern portion of Sorenson's land, but he did not sue an alternative condemnee. After trial, the court granted Sorenson a way of necessity across the alternative route proposed by Czingier. On appeal, Sorenson argued that the trial court erred because Czingier failed to meet his burden of proving a reasonable alternative route because that route ran across the properties of people who were not parties to the suit. The Court of Appeals disagreed. Citing RCW 8.24.025,⁷ the court confirmed the condemnor has the burden of proving necessity for a private way, including the absence of feasible alternatives. It concluded that "[f]ailure to join the owner of property over which a proposed alternative route would pass does not absolutely preclude consideration [of it] if the evidence shows it is otherwise feasible." *Sorenson*, 70 Wn. App. at 276. However, the court reversed the trial court's decision in favor of the condemnee, finding that

⁷ Historically, to defeat an easement route selected by the condemnor, the condemnee was required to show there was a more practical or feasible route available to the condemnor and that the condemnor selected their route based on bad faith, oppression or abuse. RCW 8.24.025 eliminated the bad faith requirement and, instead, required that the chosen route be more equitable than the alternative route. Under this statute, the condemnor has the burden to show that a private way of necessity exists and that the route selected is the most reasonable alternative. Once necessity is established, the potential condemnee may demonstrate the existence of a feasible alternative. The burden then shifts to the condemnor to show that the chosen route is more equitable. *Sorenson*, 70 Wn. App. at 276 n.2.

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Sorenson met his burden of proving necessity of route

across Czinger's property. It granted the condemnee attorney fees on appeal, noting RCW 8.24.030 does not limit the award of fees to prevailing parties. *Sorenson*, 70 Wn. App. at 279.

In *Kennedy*, a condemnee defended itself by asserting an alternative route over an adjacent landowner's property and joining that landowner as alternative condemnee through a third party complaint. The trial court awarded the way of necessity over the original condemnee's property and required him to pay the alternative condemnee's attorney fees. On appeal, the original condemnee argued that it had no choice but to join the adjacent landowner as alternative condemnee. The *Kennedy* court disagreed and stated, "the failure to join a party does not prevent the court from considering an alternative route of a nonparty if the evidence shows that it is feasible." *Kennedy*, 115 Wn. App. at 871. The Court of Appeals in *Kennedy* further confirmed that "[n]othing in *Sorenson* requires the joinder of the owners of the parcel containing the condemnee's proposed alternative route." 115 Wn. App. at 871. The court held that RCW 8.24.030 establishes no impediment to requiring a condemnee to pay attorney fees to a potential condemnee.

Sorenson's and *Kennedy's* interpretations of RCW 8.24.030 are persuasive,

and their explication of the burdens in a condemnation case is instructive here. As both cases acknowledge, the plain language of RCW 8.24.030 gives the trial court discretion to grant attorney fees to the condemnee, providing the court “may” grant such award. Further, these cases are helpful in determining the extent to which and the circumstances under which the exercise of that discretion is appropriate.

In *Kennedy*, the Court of Appeals properly held the trial court may exercise its discretion and require an alternative condemnee to pay an alternative condemnee’s attorney fees under certain circumstances, namely when they join the alternative condemnee as a third party. This is a sensible rule, as nothing in chapter 8.24 RCW requires a condemnee or condemnor to join a party to consider alternative routes. If the original condemnee voluntarily chooses to join a party,⁸ to mount their own defense, then the court should have the discretion to decide whether the original condemnee should pay the alternative condemnee’s attorney fees.

⁸ That is, a party who has not been deemed necessary and indispensable under Court Rule (CR) 19. *See* CR 19 (“Joinder of Persons Needed for Just Adjudication”). Tillicum does not make the argument that it was a necessary and indispensable party to the litigation, though the Nobles made a version of that argument to the Court of Appeals. Br. of Resp’t Noble at 5-6.

The present case is distinguishable from *Kennedy*. Here, the Nobles, as condemnors, sued to condemn a route over Safe Harbor's property. Unlike the condemnee in *Kennedy*, Safe Harbor did not choose to join an alternative condemnee in the action. Instead, Safe Harbor defended itself by claiming that a feasible, alternative route existed, and the Nobles chose to join Tillicum as the alternative condemnee. As condemnee, Safe Harbor has the right to raise the affirmative defense of a feasible alternative route. Further, unless joinder is required, an original condemnee is not required to add any alternative condemnee. In the absence of an alternative condemnee, pursuant to RCW 8.24.025, the trial court would have had to consider alternative routes, including the one over Tillicum's property.

According to RCW 8.24.025 and *Sorenson*, once a condemnee raises the possibility of a feasible alternative route, the burden shifts to the condemnor to prove the chosen route is more equitable than the alternative route. As Safe Harbor contends, it did not have the burden of proving that Tillicum was the more practical route. As the Court of Appeals dissent in *Noble* observed, requiring Safe Harbor to pay Tillicum's attorney fees for raising the defense of a feasible alternative route

effectively shifts the condemnor's burden of proof to Safe Harbor. The dissent correctly states:

requir[es] a condemnee to prove that a specific alternate route is better or face being denied its attorney fees and costs and being ordered to pay the alternate condemnee's fees and costs . . . makes the first condemnee "responsible" for involving the alternate condemnee simply by suggesting an alternative route.

Noble, 141 Wn. App. at 180 (Van Deren, A.C.J., dissenting).

Tillicum, on the other hand, argues that the Nobles were forced to add Tillicum or face the possibility of two separate trials against each condemnee. It contends that those trials could have resulted in no access at all for the Nobles. Answer to Pet. at 10. We do not know what the result would have been had there been two separate trials. However, we do know that the statute requires the Nobles to prove Safe Harbor had the least burdensome route without joining Tillicum. Also, the Nobles could have joined all individual members of Tillicum Beach, Inc., in the lawsuit, since Tillicum is apparently an association comprised of individual members. Instead, the Nobles, not Safe Harbor, chose to join Tillicum, and Tillicum's involvement in and expenses from the lawsuit are a result of that

decision.

Although Safe Harbor did not join Tillicum in the suit, the Court of Appeals, like the trial court, looked beyond the “mechanical process of joinder” to determine who was really “responsible for the litigation with Tillicum.” *Noble*, 141 Wn. App. at 175. In “balancing of the equities” in this case, the Court of Appeals found Safe Harbor responsible in part because its claim that the Nobles had a better route over Tillicum’s property was based on a weak defense, evidence of Paul Stokes, who the court concluded was not a credible witness. *Noble*, 141 Wn. App. at 176.

Similarly, Tillicum argues Safe Harbor should pay its attorney fees because “[w]ithin certain very broad limits, parties have the right to make claims in litigation that turn out to be not accepted by the trier of fact. However, sometimes there are consequences.” Answer to Pet. at 15. Tillicum asks this court to consider the “scope of [Safe Harbor’s] unfounded claims, beginning with . . . an (unnamed) more feasible alternative, and the work it took to respond” and find “the responsible party is Safe Harbor.” Answer to Pet. at 16. In doing so, Tillicum *implies* that Safe Harbor’s defense at trial was either so unfounded or ineffective that it should be penalized for defending itself by paying Tillicum’s attorney fees. The way for a trial

court to account for a condemnee's actions is in its calculation of how much, if any, to award that condemnee in statutory attorney fees.

Although the trial court has discretion under RCW 8.24.030 to provide condemnees with attorney fees, the statute does not support awarding fees against a condemnee where that condemnee does not choose to join any other party as an alternative condemnee. Holding otherwise would inhibit Safe Harbor and other condemnees in its position from asserting their statutory defense of a possible alternative route. Accordingly, we vacate the trial court's order awarding attorney fees to Tillicum against Safe Harbor, including those awarded to Tillicum on appeal.

As to the second issue in this case, we affirm the trial court's order reducing Safe Harbor's attorney fees award against the Nobles. Under RCW 8.24.030, the trial court has discretion to determine what amount, if any, a condemnee receives in attorney fees from a condemnor. In doing so, a trial court may consider a condemnee's actions in light of the particular circumstances of each case. Here, the trial judge considered Safe Harbor's actions during the course of the case to increase the cost of litigation. In attempting to "balance the equities," the trial court concluded that Safe Harbor's award against the Nobles should be lessened by 70

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percent. This is an appropriate exercise of the trial court's discretion.

Conclusion

We reverse in part and affirm in part, and we remand the case so that Tillicum can pursue its claim for attorney fees against the Nobles, from whom it sought recovery in the alternative.

AUTHOR:

Justice Charles W. Johnson

WE CONCUR:

Justice Susan Owens

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Richard B. Sanders
